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United States Supreme Court

OCTOBER TERM, 1965

No. 263

UNITED STATES OF AMERICA,

v.

HOWARD DREW WAGNER,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER IN REPLY

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REPLY BRIEF

POINT I

The government's contention that the licensing statute of the State of New York does include non-residents as such, is incorrect. The argument is correct only as to those non-residents specified in paragraph "3" of Section 1903, of the New York State Penal Law. This completely excludes the defendant, Wagner.

Before a license may be obtained the law makes mandatory the submission of an application. An application may however be submitted only where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper. Defendant fits into none of these categories. It is therefore impossible for a non-resident who has no residence, employment or principal place of business in New York State to submit an application for a license to obtain a pistol or revolver. This law clearly discriminates unconstitutionally against non-residents of the State of New York unless they come within the provisions of paragraph "3."

The government's argument as submitted on page "4" of the Answering Brief is taken out of context. They quoted from paragraph "2(e)" of Section 1903, which deals exclusively with types of licenses. It is obvious that no type of license can be issued if an application therefor cannot be submitted. The language quoted by the government on page "4" of its brief does not eliminate the requirements for an applicant to either reside, be principally employed, or have his principal place of business as a merchant or storekeeper in the State of New York. In quoting

paragraph "7" of Section 1903, on page "4" of its brief, the government once again takes its language out of context. Section "7" simply sets forth what information shall be contained on the license form itself. Paragraph "7" in no way modifies the requirements of paragraph "3."

Although the State of New York may discriminate in favor of its own residents, the United States government in adopting Section 1903, of the New York State Penal Law as its own cannot discriminate against a resident of another state without violating the constitutional rights of such non-resident. At the very least, the statute as applied by the United States Government in prosecuting a resident of another state for a crime allegedly committed on Federal Lands, (West Point) located within the boundaries of New York State, submits an interpretation of the law which is clearly ambiguous and must be deemed unconstitutional. In addition, the Federal Government unconstitutionally discriminates against this defendant by asking to adopt paragraph "2(e)" and "7," and claiming that the same enlarges paragraph "3," when the wording of paragraph "3" is in contradiction, clearly creates an unclear and ambiguous statute which must be deemed unconstitutional. (People v. Pieri) 199 N.E. 495, 269 N.Y. 315.

Obviously, if the defendant could not possibly submit an application to obtain a license for a gun, as a non-resident not within the scope of paragraph "3," any effort on his part so to do would be futile and a nullity, see also (People v. Puerto Rico, et al) 58 Sup. Ct. 167; 302 U.S. 253.

POINT II

The government's contention that the petitioner engaged as trial counsel approximately three weeks before trial, is erroneous. The record clearly shows that the defendant never engaged Mr. Benjamin as trial counsel or otherwise. That it was a Mr. Frankel whom he engaged, and who never appeared in Court, although defendant was under the clear impression that Mr. Frankel was to try his case (R110, 111, 117).

Although Mr. Benjamin, an attorney never engaged by the defendant advised that he was ready for trial, the record clearly shows that the defendant disputed this contention, with justification in that Mr. Benjamin did not know the facts of that case and that the defendant was deceived as to who his trial counselor was to be (R106, 110, 111, 117, 121, 356 and 357).

The government's claim that the defendant stated that Mr. Benjamin was competent, clearly does not express the petitioner's true sentiments. Obviously, the petitioner had never seen Mr. Benjamin try a case in Court. Regardless as to Mr. Benjamin's competency as an attorney, the record shows again and again that the defendant claimed Mr. Benjamin was incompetent to try his case under the circumstances prevailing (114, 121, 356, 357, 364, 368 and 441).

The fact that four counts of the indictment were dismissed (one being dropped), in the case at bar, it certainly is not necessarily to the credit of the defendant's counsel, but rather due to the fact that the government had no case. The testimony of the government's own witnesses clearly showed this as a fact.

The defendant never stated, as the government implies, that his counsel was prepared, knew the facts, and that he was being adequately represented. What the defendant did say (R359) was, "I think you have done remarkably well for what little you have to go on, and how well prepared you were."

This does not excuse the petitioner's attorney who was forced on the defendant by the Court from preparing his case, from securing material witnesses; from even discussing the case adequately with the defendant himself; not understanding whether the charge involved was a misdemeanor or a felony; not knowing whether the person who had obtained statements from your client was a member of the F.B.I. or a police officer; and failing to advise a client that his defense attorney had been changed without petitioner's knowledge and consent (R114, 121, 356, 357, 364, 368, 441 and 359, 355). Under these conditions of unpreparedness and the many circumstances which violated the defendant's constitutional rights at trial, the judgment of the learned Court that it believed the defendant's attorney had done a "good job," may have been justified. But it was not the job which defendant had a right to expect, for which he had engaged counsel and paid a fee.

POINT III

The government's contention that the petitioner was not prejudiced improperly when his counsel, then acting as assigned counsel by the Court (442), stated in the presence of the jury, "If your Honor please, my client has advised me that he does not wish to take witness stand, I would like to have his reasons or whatever he has to say on the record" (448), is simply incredible.

This Court has already held in the case of (Griffin v. California) on April 28, 1965, that such statement made in open Court in the presence of the jury was in fact highly prejudicial, and reversible error.

In the Griffin case, the Court dealt with the question of comment by the prosecutor or the presiding justice. How much more prejudicial is it, when an attorney, appointed by the Court over the defendant's objections, and which attorney allegedly is supposed to protect the defendant's interest, comments before the jury as above indicated, making it obvious to the jury that he disagreed with the defendant's refusal to take the stand. The record is replete with defendant's objection to having this attorney represent him. That this attorney was actually forced on the defendant (442).

The record clearly shows that before Mr. Benjamin advised the jury that his client refused to take the stand, and implied it was against his wishes, the defendant had advised the clerk in chambers as to exactly why he could not take the stand (363), "Even if I take the stand he wouldn't be prepared on leaving the questions to me to bring all these facts out as they took place. This would be another five minute hand by mouth type thing if I took the stand. I don't see any purpose in taking the stand at this time your Honor."

In light of the foregoing statement made by the defendant to the Court, how did this attorney, forced upon this defendant, even dare to tell the jury that he would like to have the defendant state in the record why he would not take the stand. But, incredible as it may seem, this is exactly what had happened.

Clearly, the defendant represented by an attorney the Court forced upon him, could not take the stand because said attorney was unprepared. This was known to the Court and known to the defense counsel. And yet, the Court permitted the jury to retire and deliberate on the question of guilt or innocence, with the full knowledge that the defendant refused to take the stand in opposition to his attorney's advice. This alone is prejudicial error, and cause for a reversal.

POINT IV

The gun and bullets placed into evidence at trial were not identified as the weapons possessed by petitioner on his visit to West Point. Galman testified that he could not identify these items because he did not have his glasses on at the time of the incident (250). He did not remember which M.P. he turned it over to (256). Mr. Cunpson stated he received a weapon and bullets from an Officer Stein (227). But, it was after he received the same from Stein that he marked these items. Stein was never brought in to testify. This created a hiatus and broke the chain continuity of identification. The gun and bullets were improperly introduced into evidence and formed the heart of the conviction against this defendant.

POINT V

Galman's search and seizure of the defendant's clothing was illegal. No warrant had been obtained for such search. Galman further testified that the defendant never made an aggressive act, but only upon his own suspicion, and after defendant failed to answer Galman's question as to what he had in his pocket, did Galman make "a grab" (245). He

further stated, "So far as struggling, he (the defendant) did not even put his hands on me" (93).

POINT VI

The contention by the government that the government counsel elected to withdraw his witness rather than to interject the Mallory question into the case, is completely unfounded. The fact of the matter is before the government sought to withdraw its witness, said witness had already testified to the most damaging issue of the whole case, namely, that "the defendant admitted that 'the gun that was used in the shooting' was his. He told me that he got it in Philadelphia, Pennsylvania, sometime in the summer of 1963. He thought June or possibly July of that year" (357). The damage having already been done and realizing that the Mallory rule clearly indicated a violation of the defendant's constitutional rights, the government withdrew this witness. But the jury had already had the improper testimony. The jury deliberated and found the defendant guilty on this witness' testimony more than any other. The introduction of this improper testimony alone warrants a reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

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